Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

SEAN SILVEIRA, JACK SAFFORD, PATRICK OVERSTREET, DAVID K MEHL, SGT STEVEN FOCHT, SGT DAVID BLALOCK, MARCUS DAVIS, VANCE BOYES, and KEN DEWALD, *PETITIONERS,*

-versus-

BILL LOCKYER, Attorney General, and GRAY DAVIS, Governor, State of California, *RESPONDENTS.*

On Writ of Certiorari to the US Court of Appeals for the Ninth Circuit, Stephen Reinhardt, Raymond C. Fisher, Circuit Judges, & Frank J. Magill, Senior Circuit Judge, Eighth Circuit, by designation.

PETITION FOR WRIT OF CERTIORARI

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102 pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in denying *standing* for Petitioner firearms owners and collectors to challenge under the Second & Fourteenth Amendments State statutes restricting such ownership, where Petitioners are: (**A**) seriously affected by the statutes, (**B**) in the zone of interests impacted, and (**C**) would risk prosecution and confiscation by further purchase, sale, transfer, or other noncompliance?

II. Whether the Second and Fourteenth Amendments protect the rights of *individual* persons to keep and bear arms for family, home, business and community defense, without the threat of forcible state confiscation, compulsory registration, or state-decreed monopolization?

A. Whether the right to keep and bear arms should be substantially *incorporated* into the Fourteenth, applied to the States, and *Presser v. Illinois* (US 1886) [1] limited or overruled?

B. Whether the Second Amendment should be held to be part of the Fourteenth Amendment protected *privileges and immunities* of citizens, as the documentary history suggests, and *Saenz v. Roe* (US 1999)[2], applied. Then, whether *United States v. Cruikshank* (US 1876)[3], and the *Slaughterhouse Cases* (US 1873)[4], should be limited or overruled?

III. Whether the heavily criticized and ambiguous decision of Justice McReynolds in *United States v. Miller* (US 1939)[5], decided without argument or counsel for Miller, should be limited or overruled after these 64 years, in favor of a comprehensive opinion from this Court recognizing as fundamental the individual right of

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1 116 U.S. 252 (1886).
2 526 U.S. 489, 503-04 (1999).
3 92 U.S. 542 (1876).
4 83 U.S. (16 Wall.) 36 (1873).
5 307 U.S. 174 (1939).

family, home, business, and community defense under the Second and Fourteenth Amendment right to keep and bear arms?

IV. Whether a *heightened standard of review* should be applied to a State statute that specifically impacts fundamental rights expressly protected by the Second Amendment and incorporated into the Fourteenth for additional reasons of family, home, business, and community defense that further emerged after the Civil War with the forced disarming of the freedmen and oppression of their families and entire communities based upon race, as in the Colfax and New Orleans massacres?

V. Whether the judgment of the Court of Appeals should be reversed and the case remanded for trial on the merits, and a record of expert and factual testimony developed concerning the Second Amendment and the specific firearms and factual issues involved in this case?

VI. Whether for remand this Court should order assessment of §1988 interim litigation expenses and counsel fees for Petitioners prior to trial on the merits of the remaining factual and legal questions?

TABLE OF CONTENTS

Table of Cited Authorities
Cases: v
Statutes: vii
Constitutional Provisions: vii
Historical Documents, Treatises, & Articles: viii
Opinions Below 1
Jurisdiction of this Court 1
Statement of the Case 1

ARGUMENTS FOR GRANT OF CERTIORARI:

I. THE COURTS OF APPEAL ARE IN SERIOUS **CONFLICT** OVER THE REQUIREMENTS FOR ***STANDING*** OF LITIGANTS TO CHALLENGE RESTRICTIONS ON THE SECOND AND FOURTEENTH AMENDMENT RIGHT TO KEEP AND BEAR ARMS. THE OPINION BELOW ON STANDING CONFLICTS WITH: **(A)** THE CONTRARY RESULT IN *US V. MILLER*, 307 U.S. 174 (1939), **(B)** NUMEROUS HOLDINGS ON STANDING FROM THIS COURT, **(C)** THE PERSUASIVE IN-DEPTH ANALYSIS OF OTHER CIRCUITS, JUSTICES, & JUDGES, **(D)** THE THOROUGH ANALYSIS OF *US V. EMERSON*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 534 U.S. ___ (2002), & **(E)** THE CONSIDERED VIEWS OF JUDGES KOZINSKI, KLEINFELD, O'SCANNLAIN, NELSON, AND GOULD DISSENTING FROM DENIAL OF REHEARING EN BANC....3

II. THE COURTS OF APPEAL ARE IN FURTHER **CONFLICT** ON WHETHER THE SECOND AMENDMENT PROTECTS THE **RIGHTS OF *INDIVIDUAL* PERSONS** TO KEEP AND BEAR ARMS FOR FAMILY, HOME, BUSINESS, AND COMMUNITY DEFENSE. THE OPINION BELOW BY JUDGE REINHARDT DISREGARDS: **(A)** CONTRARY STATEMENTS IN *US V. MILLER*, 307 U.S. 174 (1939), **(B)** OTHER BILL OF RIGHTS AMENDMENTS, **(C)** FREQUENT LANGUAGE FROM THIS COURT, **(D)** THE PERSUASIVE IN-DEPTH ANALYSIS OF *US V. EMERSON*, 270 F.3d 203 (5th Cir.), *cert. denied*, 534 U.S. ___ (2002), & **(E)** THE STRONG ARGUMENTS PUT FORTH BY THE SIX CIRCUIT JUDGES BELOW DISSENTING FROM DENIAL OF REHEARING EN BANC ...6

III. THE DECISION OF THE COURT OF APPEALS IS ALSO IN **CONFLICT** WITH PERSUASIVE EARLY DECISIONS OF THE **HIGHEST COURTS OF SEVERAL STATES** INTERPRETING THE FEDERAL SECOND AMENDMENT AS PROTECTING AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS...13

IV. THE COURTS OF APPEAL ARE IN ADDITIONAL **CONFLICT** ON WHETHER THE SECOND AMENDMENT APPLIES TO THE STATES THROUGH THE DUE PROCESS AND/OR PRIVILEGES and IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT, AND WHETHER *PRESSER V. ILLINOIS,* 116 U.S. 252 (1886), SHOULD BE LIMITED OR OVERRULED, AND A FORM OF **INCORPORATION** INTO THE DUE PROCESS CLAUSE APPLIED, OR THE PERSUASIVE *SAENZ V. ROE* ANALYSIS UTILIZED...14

V. THE COURTS OF APPEAL & CITIZENS HAVE HAD *NO* DIRECT RIGHT TO KEEP & BEAR ARMS OR SECOND AMENDMENT GUIDANCE FROM THIS COURT SINCE THE SEVERELY CRITICIZED 1939 OPINION OF JUSTICE JAMES MCREYNOLDS IN *US V. MILLER,* DESPITE THE PROLIFERATION OF FIREARMS LAWS & LITIGATION. ***MILLER*** SHOULD BE CAREFULLY **RECONSIDERED** BECAUSE IT: (**A**) BADLY MISREADS HISTORY, (**B**) THE *MILLER* COURT RUSHED TO JUDGMENT WITHIN A MATTER OF ONLY A FEW WEEKS, IN WHICH THE MILLER SIDE HAD NO COUNSEL, BRIEF, OR ARGUMENT, AND (**C**) THE *MILLER* DECISION HAS SINCE CREATED INCONSISTENCY AND CONFUSION IN THE LOWER COURTS, APART FROM HAVING BEEN A PLAIN MISCARRIAGE OF JUSTICE TO THE UNREPRESENTED MILLER...19

VI. THE COURTS OF APPEAL ARE IN DISARRAY ON WHETHER TO APPLY A HEIGHTENED **STANDARD OF REVIEW** IN SECOND AMENDMENT CASES. EXPRESS FUNDAMENTAL RIGHTS ARE DIRECTLY INVOLVED AND SHOULD RARELY BE LIMITED, AND THEN ONLY FOR THE MOST COMPELLING OF JUSTIFICATIONS...27

VII. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE US COURT OF APPEALS IN *SILVEIRA V. LOCKYER,* 312 F.3d 1052 (9th Cir. 2003), AND REMAND FOR FURTHER PROCEEDINGS, INCLUDING AN INITIAL ASSESSMENT OF COSTS AND

REASONABLE INTERIM COUNSEL FEES UNDER 42 U.S.C. §1988 PRIOR TO TRIAL OF THE REMAINING FACTUAL QUESTIONS...28

CONCLUSIONS ...29

TABLE OF CITED AUTHORITIES[Φ]

*Cases:**

*Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)(standing and ripeness)...5
Ashcroft v. Free Speech Coalition, 534 U.S. ___ (2002)...5
Aymette v. The State, 21 Tenn. (2 Humphrey's) 152 (1840)(ban on concealed bowie knife brandished by angry disputant upheld)...14,23
Benton v. Maryland, 395 U.S. 704 (1969)...16,17
Bowers v. Hardwick, 478 U.S. 186 (1986)...17
Bradwell v. The State, 83 U.S. 130 (1873)...15
Brickey, *In re*, 70 Pac. 609 (Idaho 1902) (Quarles, CJ)(Second Amendment applied)...13
Bunkley v. Florida, 123 S Ct ___ (2003) (per curiam)...12,16
Cases v. United States, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943) (early application of *Miller*)...9
Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976)...16
Conley v. Gibson, 355 U.S. 41 (1957)...2
Dred Scott v. Sandford, 60 U.S. (19 Howard) 393 (1856) (Taney, CJ)(dictum on right to bear arms)...10
*Duncan v. Louisiana, 391 U.S. 145 (1968)...16,17
*Eisenstadt v. Baird, 405 U.S. 438 (1972)...4,21,27

[Φ] The unique online Library of Congress website, entitled **A CENTURY OF LAWMAKING FOR A NEW NATION**, appears on the Web at http://memory.loc.gov/ammem/amlaw/index.html. It contains fundamental primary sources on the Constitution, Bill of Rights, and Fourteenth Amendment related to this case. The site also includes ELIOT'S DEBATES, FARRAND'S RECORDS, STATUTES AT LARGE, the ANNALS OF CONGRESS, and the CONGRESSIONAL GLOBE.

* Designates those cases and authorities most frequently cited.

*Eldred v. Ashcroft, 123 S Ct 769 (2003)...10,11
*Epperson v. Arkansas, 393 U.S. 97 (1968)
(ripeness of "Evolution" teaching case)...5
Farrar v. Hobby, 506 U.S. 103 (1992)...29
Fresno RPC v. Van de Kamp, 965 F.2d 723
(9th Cir. 1992)...16
Gillespie v. City of Indianapolis, 185 F.3d 693
(7th Cir. 1999)...6
Gratz v. Bollinger, 539 U.S. ___ (2003)...5
Hanrahan v. Hampton, 446 U.S. 754 (1980)...29
Hardy v. United States, 375 U.S. 277 (1964)...26
Hensley v. Eckerhart, 461 U.S. 424 (1983)...29
Hernandez v. City of Goshen,
324 F.3d 535 (7th Cir. 2003)...12
*Hickman v. Block, 81 F.3d 98 (9th Cir. 1996)
(Hall, J, Noonan, J, & Shubb, DJ)(standing to
contest restrictions on individual right to keep
and bear arms)...*p = passim*
Lawrence v. Texas, 539 U.S. ___ (2003)...*p*
Love v. Pepersack, 47 F.3d 120 (4th Cir.), *cert. denied,*
516 U.S. 813 (1995)(Second Amendment not
applied to States)...15
*Nordyke v. King, 319 F.3d 1185 (9th Cir. 2003)
(O'Scannlain, Gould, & Alarcon)...*p*
*Nunn v. Georgia, 1 GA. 243 (1846)(early view of
federal Second Amendment)...13
Penson v. Ohio, 488 U.S. 75 (1988)
(ineffective representation on appeal claimed)...26
Planned Parenthood v. Casey, 505 U.S. 833
(1992)...11,12
Plessy v. Ferguson, 163 U.S. 537 (1896)...15
*Presser v. Illinois, 116 U.S. 252 (1886)
(Second Amendment not applied to States)...*p*
Quilici v. Village of Morton Grove, 695 F.2d 261
(7th Cir. 1982)(2-1), *cert. denied*, 464 U.S. 863
(1983)(collective view of Second Amendment)...15
Roe v. Flores-Ortega, 528 U.S. 470 (2000)...26,27
*Saenz v. Roe, 526 U.S. 489 (1999)
(modern privileges & immunities analysis)...*passim*
*Silveira v. Lockyer, 312 F.3d 1052 (9th Cir.

2003)(Reinhardt, Fisher, & Magill, Cir *JJ*)...*passim*
*Slaughterhouse Cases, 83 U.S. (16 Wall) 36 (1873) (narrow reading of privileges and immunities)...*p*
State v. Nickerson, 247 P.2d 188 (Mont. 1952)...14
State v. Sanne, 364 A.2d 630 (N.H. 1976)(accused had no counsel in firearms possession appeal)...16
State v. Smith, 571 A.2d 279 (N.H. 1990)(Johnson, J) (N.H. right to bear arms and strict scrutiny)...16
Thompson v. Western States Medical Center, 534 U.S. ___, 122 S Ct 1497 (2002)...5
*Troxel v. Granville, 530 U.S. 57 (2000) (fundamental family rights)...*passim*
*Truax v. Raich, 239 U.S. 33 (1915) (early standing and ripeness case)...1
*United States v. Cruikshank, 92 U.S. 542 (1876)...*p*
*United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 534 U.S. ___ (2002)...*p*
United States v. Friel, 1 F.3d 1231 (1st Cir. 1993) (per curiam)...9
*United States v. Harris, 959 F.2d 246 (DC Cir. 1992)(per curiam)(Ruth Bader Ginsburg, Clarence Thomas, & Silberman, JJ)...4
*United States v. Miller, 307 U.S. 174 (1939)...*p*
United States v. Verdugo-Urquidez, 494 U.S. 259 (1960)("the people")...11
*Wilson v. Layne, 526 U.S. 603 (1999)(home as fortress)...1

Statutes: Federal
FREEDMENS BUREAU ACT, 14 STAT. 173 (JULY 16, 1866) (specifically "including the constitutional right to bear arms")...8
US Code title 28, §1254(1)...12
US Code title 28, §§1331, 1343...3
US Code title 42, §1988...28,29

Constitutional Provisions:
First Amendment...*passim*
*Second Amendment...*p*

Fourth Amendment...7,16
Fifth Amendment...7,16
Sixth Amendment...7,19
Eighth Amendment...7
Ninth Amendment...11,12
*Fourteenth Amendment...*p*
New Hampshire Constitution pt I, art 2-a (1982)...16

Historical Documents, Treatises, & Articles:
*AMAR, BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998)(individual Second Amendment rights)...8,12
*Amar, *Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103 (2002)(same)...*passim*
* Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993)...17
AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 182-183 (Yale 2d ed. 2003)...4
*Barnett & Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1141 (1996)...12
Bellesiles, *Gun Control: A Historical Overview*, 28 CRIME & JUSTICE 137 (2001)...5
Black, Hugo, *The Bill of Rights*, 35 N.Y.U. L. REV. 866 (1960)...12
*BLACKSTONE, COMMENTARIES (1803) (personal right to arms and defense)...19,22,23
Brennan, William J, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961)...15
COOLEY, I A TREATISE ON THE CONSTITUTIONAL LIMITATIONS (8TH ed. 1927)(personal nature of Second Amendment rights)...19,24
*COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW sec. IV (1898)(same)...*p*
*Cottrol & Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991)(family and community defense aspect of Second Amendment as applied to States)...8
CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE (Praeger 1994)...14
Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the*

United States, 78 N.C.L. REV. 1071 (2000)...17
CURTIS, MICHAEL KENT, NO STATE SHALL ABRIDGE (Duke 1986)...17
**Declaratory Relief in the Criminal Law*, Note, 80 HARV. L. REV. 1490 (1967)(significant article on pre-enforcement ripeness questions)...5
*Denning, *Can the Simple Cite be Trusted?: Lower Court Interpretations of United States v. Miller and The Second Amendment*, 26 CUMBERLAND L. REV. 961 (1996)(analysis of misapplications of *Miller* and the disarray in the US Courts of Appeal)...20
FEDERALIST NO. 46 (James Madison) http://memory.loc.gov/const/fed/fed_46.html...22
FORGOTTEN MEMOIR OF JOHN KNOX (Univ. of Chicago: Hutchinson & Garrow eds. 2002) (an unusual year with Justice McReynolds, author of the *US* v. *Miller* (1939) opinion)...20
FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON (N.Y.: DaCapo Press 1970 ed.)...2
Gardiner, *The Second Amendment and the U.S. Courts of Appeal*, 29 NO. KY. L. REV. 805 (2002)...20
GUN CONTROL & GUN RIGHTS (N.Y.U.: McClurg, Kopel, & Denning eds. 2002)...14
HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS (Praeger 1998)...11
Halbrook, *The Freedmen's Bureau Act ...*, 29 NO. KY. L. REV. 683 (2002)...8
HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT (Blacksmith, AZ 1986)...21,22
Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. LAW & POL. 1 (1987)...12
Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992)...17
HOLLANDSWORTH, AN ABSOLUTE MASSACRE: THE NEW ORLEANS RACE RIOT OF JULY 30, 1866 (L.S.U. 2001)...18,19

Justice McReynolds material online:...20
www.michaelariens.com/ConLaw/justices/mcreynolds.html
*Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment,* 82 MICH. L. REV. 204 (1983)...8
*Kates, *The Second Amendment and the Ideology of Self-Protection,* 9 CONST. COMMENT. 87 (1992)...12
Kopel, *What State Constitutions Teach About the Second Amendment,* 29 NO. KY. L. REV. 827 (2002)...14
*KRUSCHKE, E.K., GUN CONTROL (1995)...5
*Levinson, *The Embarrassing Second Amendment,* 99 YALE L.J. 637 (1989)(article on errors of *Miller* and individual rights of Second Amendment)...8
*LEVY, LEONARD W., ORIGINS OF THE BILL OF RIGHTS (Yale 1999)(authoritative work with thorough Second Amendment analysis of individual right to keep and bear arms)...7,12
*LOTT, JOHN, THE BIAS AGAINST GUNS (Regnery 2003)...14
Lucas, *Miller* Revisited (2003)...6
LUCAS, TO KEEP AND BEAR ARMS (2003-04)...6
*MADISON, J., PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES (Univ. Press of Va. 1979)...7
MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE (Harvard 2002)...22
*MEYER, THE AMENDMENT THAT REFUSED TO DIE (Madison books 2000)...8,18
*NATIONAL ARCHIVES, SUPREME COURT CASE RECORDS, *US v. Miller,* O.T. 1938, No. 696...6,25,26
PARRISH, MICHAEL E., THE HUGHES COURT: JUSTICES, RULINGS, & LEGACY (ABC-CLIO 2002)...21
POE, RICHARD, THE SEVEN MYTHS OF GUN CONTROL (Random House: Prima 2001)...14
Puckett, Brian, *United States* v. *Miller* and Short-Barreled Shotguns (2003) (essay – publication pending)...23
RAPHAEL, A PEOPLE'S HISTORY OF THE AMERICAN REVOLUTION (N.Y. New Press 2001)...5

*RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (Phila. 2d ed., 1829) (Reprint DaCapo Press 1970)...*p*

SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION (Greenwood Press 2000)...17

SIMKIN, J. & ZELMAN A., GUN CONTROL: GATEWAY TO TYRANNY – THE NAZI WEAPON LAW 18 MARCH 1938 (1992)...28

SNEED, JOSEPH T. III, FOOTPRINTS ON THE ROCKS OF THE MOUNTAIN – AN ACCOUNT OF THE ENACTMENT OF THE FOURTEENTH AMENDMENT (1997)...17

*STORY, JOSEPH, COMMENTARIES ON THE CONSTITUTION (Rothman 1st ed. 1991)...*passim*

SWEARENGEN, IV THE WORLD'S FIGHTING SHOTGUNS (Alex. Va.: Ironside Publ. 1978)...2,23

VANDAL, RETHINKING SOUTHERN VIOLENCE: HOMICIDES IN POST-CIVIL WAR LOUISIANA, 1866-1884 (Ohio State 2000)...18,19

Volokh. *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998)...14

WATERS, ROBERT A., GUNS SAVE LIVES (WA: Loompanics.com 2002)...14

OPINIONS BELOW

The opinion of the US Court of Appeals for the Ninth Circuit under review is *Silveira* v. *Lockyer,* 312 F.3d 1052 (9th Cir.)(Reinhardt, J), *rehearing en banc denied,* 328 F.3d 567 (9th Cir. 2003)(six dissents)(**APPENDIX** at 1A-121A).

JURISDICTION OF THIS COURT

US Code title 28, §1254(1), confers jurisdiction upon the Court to decide this appeal on certiorari. Analogous cases granted, with comparable grounds for review include: *Lawrence* v. Texas, 539 U.S. ___ (2003), *Virginia* v. *Black,* 123 S Ct ___ (2003), *Wilson* v. *Layne,* 526 U.S. 603 (1999)(family home as fortress), *Saenz* v. *Roe,* 526 U.S. 489 (1999)(privileges and immunities), *Troxel* v. *Granville,* 530 U.S. 57 (2000)(fundamental family protection rights), *Truax* v. *Raich,* 239 U.S. 33, 38 (1915)(standing and ripeness).

(i) The panel judgment of the US Court of Appeals under review was filed initially December 05, 2002, and amended January 27, 2003. 312 F.3d 1052.

(ii) The Court of Appeals denied a petition for rehearing en banc on May 6, 2003. 328 F.3d 567. Six Circuit Judges dissented, four with opinions: Judges Kozinski, Kleinfeld, Gould, and Pregerson.)(**APP.** at 1A-40A).

STATEMENT OF THE CASE

Petitioners are a group of California gentlemen, good citizens, placed at great risk and disadvantage by California legislation[1] restricting the ownership, possession, and transfer of certain firearms useful for home, family, and community defense in cases of civil disturbance and terrorist disruption. Paragraphs 31 & 32 of the First Amended Complaint gave general notice

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1 The California statutes are referenced in the opinion of the US Court of Appeals below, set out in the APPENDIX, *infra.*

of their vital interests at stake and the concrete impact of the laws upon them:[2]

"31. Plaintiffs own, or would like to own, semi-automatic rifles and/or pistols subject to the terms of the statute which prohibits and/or restricts possession, use, transfer and/or sale of semi-automatic rifles and/or pistols.

"32. Plaintiffs would like to exercise their right to possess, carry and conceal firearms ..."[3] in much the

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2 Under *Conley* v. Gibson, 355 U.S. 41, 45 (1957), matters alleged are presumed to be established and provable in an appeal following dismissal on the pleadings.

3 The nature, extent, and constitutional deficiencies of any *specific* restrictions on the right to keep and bear arms in this case should first be argued in depth and determined at trial on remand after guidance from this Court, and full expert and lay testimony. This petition does not present specific questions on the details of those complex Second Amendment issues. It squarely raises only the core Second/Fourteenth Amendment right to keep and bear arms issues, as well as the important need for a heightened standard of review of any infringements of this express fundamental right.

The Court should be aware that the pejorative expression "assault weapon" is used by anti-firearm activists to frighten and mislead, not to inform. The firearms in question are well-engineered and functionally ordinary rifles useful for home and personal defense, sport, hunting, and protection against terrorists and looters in times of civil disturbance. "Assault weapon" belongs in the Political "Buzzword Hall of Fame." It obstructs rather than aids the constitutional inquiry. The same is true of the other "buzzword," "sawed-off shotgun." Our Revolutionary defenders used the analogous short-barreled shot-shooting "blunderbuss" defensively against the British, especially in close naval combat. Later, explorers such as Lewis & Clark, and stage coach guards, used short guns against highway robbers and grizzly bears. The British in 1775 forcibly disarmed Bostonians of some 38 blunderbusses because such short-barreled shotguns were useful and effective defensive weapons, and still are. *See* RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (N.Y.: DaCapo Press 1970 ed.).

An excellent detailed and illustrated history of versatile short-barreled firearms as military and defensive weapons is IV SWEARENGEN, THE WORLD'S FIGHTING SHOTGUNS (Alex. Va.: Ironside Publ. 1978). Author-scholar Swearengen deflates much of the uninformed bias toward shotguns. He notes that while John

same manner as did the Founders of the Constitution and authors of the Bill of Rights. The First Amended Complaint states:

Para 35: "Plaintiff PATRICK OVERSTREET is a resident of Marin County .... He is employed by the San Francisco Police Department as a S.W.A.T. officer, and [is] a graduate of California State University...."

Para 37: "Plaintiff SGT. STEVEN FOCHT ... performed military functions in Desert Storm .... He was honorably discharged, and currently [is] a Sergeant in the California Army National Guard."

Para 38: "Plaintiff SGT. DAVID BLALOCK is a resident of Sacramento County .... He was assigned to the 82nd Airborne Division [and] is a Purple Heart recipient from combat injuries .... [He is] currently a Sergeant in the California Army National Guard."[4]

ARGUMENTS FOR GRANT OF CERTIORARI

I. THE COURTS OF APPEAL ARE IN SERIOUS CONFLICT OVER THE REQUIREMENTS FOR *STANDING* OF LITIGANTS TO CHALLENGE RESTRICTIONS ON THE SECOND AND FOURTEENTH AMENDMENT RIGHT TO KEEP AND BEAR ARMS. THE OPINION BELOW ON STANDING CONFLICTS WITH: (A) THE CONTRARY RESULT IN *US V. MILLER*, 307 U.S. 174 (1939), (B) NUMEROUS HOLDINGS FROM THIS COURT, (C) THE PERSUASIVE IN-DEPTH ANALYSIS OF OTHER CIRCUITS & JUDGES, (D) THE ANALYSIS OF *US V. EMERSON*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 534 U.S. ___ (2002), & (E) THE CONSIDERED

Dillinger used short shotguns, so too did the US Military in World War I, and often the police in modern times. Id. at 278-288. The 18 or 20 inch barrel length was an arbitrary line, with no basis in Second Amendment language or history. A short shotgun is simply more maneuverable for close range defense.

[4] The notice allegations in this case generally aver that plaintiffs have direct and immediate interests in contesting the restrictions of the law that affect them directly, sufficient to meet basic requirements of standing and ripeness. Petitioner-plaintiffs assert federal question and civil rights jurisdiction under 28 U.S.C. §§1331, 1343, and raise meritorious federal constitutional claims.

VIEWS OF JUDGES KOZINSKI, KLEINFELD, O'SCANNLAIN, NELSON & GOULD DISSENTING FROM DENIAL OF REHEARING EN BANC.

Individual **standing** was not a difficult question in the 1939 Second Amendment case here, *US* v. *Miller*.[5] The government did not contest the standing of affected *individuals* to challenge firearms restrictions, when faced with possible enforcement, fines, and other criminal penalties.[6] Standing was evident in *Miller*, whether Jack Miller had sued before being prosecuted, or defended afterwards. Judge Kozinski in dissent points out that *Miller* upheld the standing of the individual defendants, and then moved on to the merits.[7] See also *Eisenstadt* v. *Baird*, 405 U.S. 438, 443-46 (1972)(leading standing case).

The *Silveira* decision below, however, approaches standing in an atypical awkward way. Judge Reinhardt relates standing to the merits, which he also decided incorrectly. The complaint is more than adequate for standing under decisions of this Court.

The present Court and others have noted the American "background of widespread lawful gun ownership ...." *United States* v. *Harris*, 959 F.2d 246 (DC Cir. 1992)(per curiam)(Ruth Bader Ginsburg, Clarence Thomas, & Silberman, JJ).[8] The Court has

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[5] 307 U.S. 174 (1939). Similarly, Lawrence had standing to challenge the Texas law at issue in *Lawrence* v. *Texas*, 539 U.S. ___ (2002), although *Bowers* seemingly foreclosed his claim, until this Court overruled *Bowers*. *Miller* is at least as weak a precedent and ripe for overruling as *Bowers*. Here we have a fundamental enumerated right and a more extensive documentary history.

[6] It is undisputed that California enforces the statutes.

[7] *Silveira* v. *Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003)(Kozinski, *J*, dissenting from denial of rehearing en banc).

[8] One Colonial history after the other portrays the early American families as armed for protection. Benjamin Franklin organized one of the first private defensive militia when the Quaker government declined to do so. *See* AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 182-183 (Yale 2d ed. 2003). Males from 17 upward, and many females, used their privately held arms in joining with the informal and formal community militia in the revolution against British

repeatedly decided important standing cases where the existence of a new statute, and the reasonable possibility of prosecution, allows a pre-enforcement decision on the merits for persons adversely affected. *Gratz* v. *Bollinger*, 539 U.S. ___ (2003)(slip opinion pp. 11-14), *Thompson* v. *Western States Medical Center*, 534 U.S. ___ (2002)(pre-enforcement standing found), *Epperson* v. *Arkansas*, 393 U.S. 97 (1968)(ripeness without enforcement). See also *Ashcroft* v. *Free Speech Coalition*, 534 U.S. ___ (2002), on the Amendment adjacent to the Second. *See* Note, *Declaratory Relief in the Criminal Law*, 80 HARV. L. REV. 1490 (1967).

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967), is a leading standing case that conflicts with the court below. Justice Harlan noted there:

"the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." Id. at 152.

The *Silveira* statement[9] on standing is this:

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oppression. The British always had the disarming of American patriots high on their agenda. See RAPHAEL, A PEOPLE'S HISTORY OF THE AMERICAN REVOLUTION 49, 55 (N.Y. New Press 2001). The "shot heard round the world" was fired by British intent upon disarming Americans. That is part of the solid backdrop of the Second Amendment rationale for protecting the rights of citizens to be armed for defense against redcoats, burglars, looters, or terrorists.

[9] The *Silveira* opinion initially cited Michael A. Bellesiles, *Gun Control: A Historical Overview*, 28 CRIME & JUST. 137, 174-76 (2001)...." 312 F.3d at 1052, 1057 n.1.

Michael Bellesiles is the historian who in 2002 resigned under pressure from Emory University, and was also stripped of his Bancroft Prize by Columbia University for faulty historical research on this issue, which the Court below embraced. On January 27, 2003, Judge Reinhardt deleted the Bellesiles cite and substituted another in its place: *See* EARL R. KRUSCHKE, GUN CONTROL 84, 170 (1995). The KRUSCHKE book, however, supports these petitioners.

Another Ninth Circuit panel promptly critiqued Judge Reinhardt for his advisory opinion in *Silveira*. *Nordyke* v. *King*, 319 F.3d 1185 (9th Cir. 2003), as did the six circuit judges dissenting from denial of rehearing en banc here. 327 F.3d at 567-592.

"The amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use. This conclusion is reinforced in part by *Miller*'s implicit rejection of the traditional individual rights position. [P]laintiffs lack standing ...." 312 F.3d at 1056.

That quote from Judge Reinhardt is a *non sequitur,* with *multiple* errors. *Miller* did *not* reject an individual rights position at all. *Miller* accorded standing to Jack Miller, allowing him to challenge the statute on its merits, even though he was dead, and had no counsel or argument in the Supreme Court.[10] The *Miller* litigation never was resolved because Jack Miller was gone. He could not therefore press to put on further evidence and argument at trial post-remand.

Silveira recognized the divisive conflict of Circuits:

"Other courts have addressed Second Amendment claims on the merits, rather than under the rubric of standing doctrine. *See, e.g., Gillespie*, 185 F.3d at 710. ***" 312 F.3d at 1067 n.17.

II. THE COURTS OF APPEAL ARE IN FURTHER CONFLICT ON WHETHER THE SECOND AMENDMENT PROTECTS THE RIGHTS OF *INDIVIDUAL* PERSONS TO KEEP AND BEAR ARMS FOR FAMILY, HOME, BUSINESS, AND COMMUNITY DEFENSE. THE OPINION BELOW BY JUDGE REINHARDT DISREGARDS:

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10 As historical fact, Jack Miller was denied appellate counsel and argument. He was given only two weeks to obtain counsel and file a brief. *See* NATIONAL ARCHIVES, Supreme Court Case Records, *United States* v. *Miller,* October Term 1938, No. 696. The Justices noted probable jurisdiction in *Miller* on March 13, 1939. Under current practice, Rule 25[1], the government would have 45 days from March 13 to file the appellant's brief on the merits, to April 27, 1939. Counsel for Miller would then have 30 more days to file a brief for appellee, until May 27. However, in 1939, the Clerk gave Miller only until March **31** to file a brief and appear for argument. In fact argument was held one day before, with Miller not represented at all. 307 U.S. 174. This material was uncovered in 2003, and is the subject of a pending article: Lucas, *Miller* Revisited (2003). It is also included in a chapter of the forthcoming book analyzing the Second and Fourteenth Amendment right to arms issues: LUCAS, TO KEEP AND BEAR ARMS (2003-04).

(A) CONTRARY STATEMENTS IN *US v. MILLER*, 307 U.S. 174 (1939), (B) OTHER BILL OF RIGHTS AMENDMENTS, (C) FREQUENT LANGUAGE FROM THIS COURT, (D) THE PERSUASIVE IN-DEPTH ANALYSIS OF *US* v. *EMERSON*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 534 U.S. ___ (2002), & (E) THE STRONG ARGUMENTS PUT FORTH BY THE SIX CIRCUIT JUDGES BELOW DISSENTING FROM DENIAL OF REHEARING EN BANC.

" ... John Adams quoted Serjeant-at-Law William Hawkin's Pleas of the Crown ... regarding the right: 'Here every private person is authorized to arm himself' for his own defense. Similarly, Samuel Adams quoted Blackstone on the personal right to bear arms."

LEONARD LEVY, ORIGINS OF THE BILL OF RIGHTS 141 (Yale 1999)

The First, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments all protect *individual* rights, *not* rights of the State. The Fourteenth Amendment also concerns *individual* rights, not rights of the former Confederate states. When James Madison in 1789 introduced the Bill of Rights he wrote that they "relate first to private rights." 12 PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES 193 (Univ. Press of Virginia 1979). He was not introducing rights of States but of individuals.

The Second Amendment also pointedly assures that "*the right of the people to keep and bear arms shall not be infringed.*" The *Silveira* Reinhardt opinion is at odds with the language and purposes of the Second, even moreso after ratification of the Fourteenth.[11] As Judge Kozinski noted in dissent below (**APP.** at 4A),[12] the Fourteenth was preceded by frequent explicit discussion of the need for freedmen (and white supporters) to be protected in their rights

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[11] *Silveira* acknowledges that *Miller* is "a somewhat cryptic discussion" and "offers little guidance as to what rights the Second Amendment does protect," 312 F.3d at 1061.

[12] *Silveira* v. *Lockyer*, 327 F.3d 567, 568-69 (9th Cir. 2003)(Kozinski, *J*, dissenting from denial of rehearing en banc).

to bear arms, and to defend themselves from attacks, lynching, and outright massacre by the Klan.[13]

A. CONFLICT AMONG THE CIRCUITS

Silveira, and *Emerson* from the Fifth Circuit, are verbally at war on this point. Six dissenters from the Ninth are on the side of the Fifth, including Judges Kozinski, Kleinfeld, O'Scannlain, Nelson, and Gould (**APP**. at 1A-40A), aligned against Reinhardt. *Silveira* describes the broader disarray across all of the Circuits: "[T]he majority of circuit courts have, with comparatively little analysis, adopted the collective rights view[;] the Third and Tenth Circuits appear to have suggested the possible use of some form of intermediate model." 312 F.3d at 1064 n.11. 270 F.3d at 218-20. The Court in *Emerson* concluded in the words of Judge Garwood (who studied History at Princeton):

"We have found no historical evidence that the Second Amendment was intended to convey militia power to the states, ... or applies only to members of a select militia while on active duty. All of the evidence indicates that the Second Amendment, like other parts of the Bill of Rights, applies to and protects individual Americans.

"We find that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select

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[13] This material can be thoroughly developed in briefing. See generally FREEDMENS BUREAU ACT, 14 STAT. 173, 176 (JULY 16, 1866) (specifically "including the constitutional right to bear arms"), AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 257-68 (1998), MEYER, THE AMENDMENT THAT REFUSED TO DIE (Madison books 2000), Cottrol & Diamond, *The Second Amendment: Toward an Afro-American Reconsideration,* 80 GEO. L.J. 309 (1991), Levinson, *The Embarrassing Second Amendment,* 99 YALE L.J. 637 (1989)(article on errors of *Miller* and individual rights protected by Second Amendment), Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment,* 82 MICH. L. REV. 204 (1983), Halbrook, *The Freedmen's Bureau Act ...,* 29 NO. KY. L. REV. 683 (2002).

militia or performing active military service or training." Id. at 260.

Silveira makes this forlorn observation:

"We agree that our determination in *Hickman* that *Miller* endorsed the collective rights position is open to serious debate. We also agree that the entire subject of the meaning of the Second Amendment deserves more consideration than we, or the Supreme Court, have thus far been able (or willing) to give it." 312 F.3d at 1064.

Petitioners will also respectfully urge former members of the First Circuit to exercise independent reconsideration of previous per curiams from their Circuit.[14] Those trace back to very early cases of the 1940s. The Court today can do far better than *US* v. *Miller* and *Cases* v. *United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943), an early, unusual, and arguably erroneous application of *Miller*.

Within the Ninth Circuit there is also stark and repeated internal disagreement. Less than a month after *Silveira*, another Ninth Circuit panel disagreed on the merits, but also held itself bound by *Hickman*. *Nordyke* v. *King*, 319 F.3d 1185 (9th Cir. 2003), said this: "the *Silveira* panel's exposition of the conflicting interpretations of the Second Amendment was both unpersuasive and ... unnecessary." A member of the *Nordyke* panel wrote an extensive rebuttal to *Silveira*. *Nordyke* v. *King*, *supra* (Gould, *J*, concurring). Judge Gould concluded:

"*Hickman* v. *Block*, 81 F.3d 98 (9th Cir. 1996), was wrongly decided, that the remarks in *Silveira* v. *Lockyer*, 312 F.3d 1052 (9th Cir. 2002), about the 'collective rights' theory of the Second Amendment are not persuasive, and that we would be better advised to embrace an 'individual rights' view of the Second Amendment, as was adopted by the Fifth

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14 *See, e. g., United States* v. *Friel*, 1 F.3d 1231 (1st Cir. 1993)(per curiam)(federal conviction for possessing a firearm after a felony conviction upheld – Second Amendment argument rejected.). *Friel* is distinguishable as a felon in possession case. This petition does not present any such issues.

Circuit in *US* v. *Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), consistent with *US* v. *Miller*, 307 U.S. 174 (1939)." 319 F.3d at 1192. (*See also* **App.** at 39A).

The repeated conflicts in and among *Emerson*, *Nordyke*, *Silveira*, and other cases, are compelling reasons for the Court to take up this important case.

B. Dictum References to Individual Right

This Court lastly appears, in repeated dicta, to regard the Second Amendment as an *individual* right. Surely the first relevant reference to the Second Amendment in the US Reports appears in the denial of *all* rights to Dred Scott in *Scott* v. *Sandford*, 60 U.S. (19 Howard) 393, 416-17 (1856)(Taney, *CJ*). Taney attempts to justify his denial of rights to slaves:

> "For if they were so received, and entitled to the privileges and immunities of citizens ... . It would give to persons of the negro race ... the full liberty of speech ... ; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."

Taney equates the First and Second amendments as fundamental core rights. He makes no mention of the grammatically prefatory militia clause in the Second Amendment. As these Petitioners and six dissenting Ninth Circuit judges suggest, that clause was a reminder of only one purpose of the Amendment, among several others. It is not worded as a limitation on the express right, and certainly does not restrict the Fourteenth Amendment. It does not say that the right belongs to the States. (States have *powers* more than rights.) Its negative usage is an example of historical revisionism.

The recent Copyright extension case, *Eldred* v. *Ashcroft*[15] is instructive by analogy. Eldred argued that the preambular language identified the sole purpose for which Congress may legislate, that the meaning of "limited Times" must be 'determined in

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[15] 123 S Ct 769 (2003).

light of that end. The preamble of Article I, §8, cl. 8 states a purpose "to Promote the Progress of science and useful arts ...." This Court refused to accept a reading of the Copyright Clause tied to its Preamble: "by securing for limited times to authors." The Court declined to use the vague term "limited times" as a limitation on the term of a copyright. The militia clause in the Second Amendment is just as vague and not intended or written as a limitation on the right of the people to keep and bear arms. Significantly, Justice Ginsburg stated in *Eldred*: "It is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."[16]

The Court could clarify as it did in *Eldred* that the preamble is not a narrow limitation. The militia interest is, under the *Eldred* approach, but one of several historical purposes, applicable today to home and business defense.[17] *Eldred* comes as a timely analogy. Congress has spoken for the right to keep and bear arms on many occasions, as when the Freedmen's Bureau Act was enacted in part to protect "the right of the people to keep and bear arms ...."[18]

The *Silveira* court disregards further significant dicta from this Court. Chief Justice Rehnquist, in a well-considered reference in *US* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), stated:

"The Second Amendment protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people.' ..."

Similarly, the plurality opinion in *Planned Parenthood* v. *Casey* in considered dictum treats the

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16 Id. at 785.

17 A local reminder would be the recent tale of DC Mayor William's barber chasing a robber away with a defensive firearm. See Washington Post, B5, May 17, 2003.

18 14 STAT. 173, 176. *See generally* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (Praeger 1998).

Second Amendment as an individual right.[19] This reflects a widespread understanding that the Second Amendment protects a fundamental individual right to keep and bear arms. This right is all the more important because this Court has recognized no liberty right to protection by the police when being threatened or attacked.[20] Citizens *need* the Second Amendment for protection of their families, homes, and businesses.

A great many more jurists, scholars, and courts have found the Second Amendment right to be individual, as well as community oriented. These include Pulitzer Prize winning Bill of Rights scholar Leonard Levy.[21] Justice Joseph Story, certainly a

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19 The plurality opinion by Justices Souter, O'Connor, and Kennedy in *Casey* states:
"Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Constitution, Amendment IX. As the second Justice Harlan recognized:
'... This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; ... and so on. ... [C]ertain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.' " *Casey*, 505 U.S. 833, 849 (1992). See also Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 866 (1960)(incorporation of Bill of Rights into Fourteenth).

20 Cases such as *Hernandez* v. *City of Goshen*, 324 F.3d 535 (7th Cir. 2003), uniformly find no police department liability under §1983 for reckless indifference in responding to imminent threats that turn fatal. This leaves the first line of self defense against home burglars, looters, and terrorists in the citizens' own hands.

21 See, e. g., AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998), LEVY, LEONARD W., ORIGINS OF THE BILL OF RIGHTS 133-149 (Yale 1999 ed.), COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW sec. IV (1898), V RAWLE, WILLIAM, A VIEW OF THE CONSTITUTION OF THE UNITED STATES doc. 9 (Phila. 2d ed., 1829)(NY: DaCapo Press 1970), Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992), Barnett & Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1141 (1996), Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. LAW. & POL. 1 (1987), Van

credible authority on matters from the founding era, would agree with petitioners. He stated, long ago, and in context: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic ...." III STORY, JOSEPH, COMMENTARIES ON THE CONSTITUTION at 746, §1890 (Rothman 1st ed 1991). This Court should resolve these conflicts in the lower courts over "individual rights."

III. THE DECISION OF THE COURT OF APPEALS IS ALSO IN CONFLICT WITH PERSUASIVE EARLY DECISIONS OF THE HIGHEST COURTS OF SEVERAL STATES INTERPRETING THE FEDERAL SECOND AMENDMENT AS PROTECTING AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS.

One important conflicting historical State case is *Nunn* v. *Georgia*, 1 GA. 243, 250 (1846), decided by the highest court of one of the original thirteen States. *Nunn* stated:

"The language of the second amendment is broad enough to embrace both Federal and State governments ...."

That Georgia Supreme Court held specifically:

"The right of the whole people, old and young, men and women, and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed ... in the smallest degree ...."[22]

The holding of *Nunn* reflects the venerable view of RAWLE, cited above. It also finds support in the dissenting opinion below of Judge Kleinfeld. (**APP.** at 16A). *Nunn* is much closer to the history and heart of the Founders' Second Amendment.[23] The *Silveira*-

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Alstyne, *The Second Amendment and the Personal Right to Arms*, 93 DUKE L.J. 1236 (1994).

[22] *Nunn* v. *Georgia*, 1 GA. 243, 251 (1846)(Lumpkin, *J*).

[23] A second historic and conflicting State Second Amendment decision, contrary to the Ninth Circuit, is *In re Brickey*, 70 Pac. 609, 101 Am. St Rep 215 (Idaho 1902)(Quarles, *CJ*). *Brickey* squarely held that a state law prohibiting private persons from

Reinhardt opinion snubs the rich State court jurisprudence in this field. *Miller* also missed many thoughtful and relevant state constitutional provisions and cases.[24] Justice McReynolds relied on *Aymette* v. *State,* 21 Tenn. (2 Humphr) 154 (1840), which involved a ruffian aggressively brandishing a bowie knife after a quarrel. It would be a daunting task to find a case more inapposite for analyzing the Second Amendment rights of peaceable citizens.

This Court should grant certiorari to resolve these conflicts among the State and federal courts. A thorough analysis would surely agree with this: "Dispassionate scholarship suggests quite strongly that the right of the people to keep and bear arms meant just that." Justice Antonin Scalia, A MATTER OF INTERPRETATION 137 (Princeton 1997).

IV. THE COURTS OF APPEAL ARE IN ADDITIONAL CONFLICT ON WHETHER THE SECOND AMENDMENT APPLIES TO THE STATES THROUGH THE DUE PROCESS AND/OR PRIVILEGES & IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT, AND WHETHER *PRESSER* V. *ILLINOIS*, 116 U.S. 252 (1886), SHOULD BE LIMITED OR

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carrying any deadly weapon, concealed or otherwise, within municipal limits violated the US Second Amendment. *See also State* v. *Nickerson,* 247 P.2d 188, 192 (Mont. 1952)(Adair, J), for a classic home defense case with case law discussion. A fine book that covers the early case law well is CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE (Praeger 1994).

The Second Amendment makes no distinction between concealed arms and not. There is considerable evidence of lower crime rates in States where law-abiding citizens may carry concealed defensive weapons and keep others at home. Guns in the hands of law-abiding citizens and at home deter burglars. *See generally* LOTT, JOHN, THE BIAS AGAINST GUNS (Regnery 2003), GUN CONTROL & GUN RIGHTS (N.Y.U.: McClurg, Kopel, & Denning eds. 2002), POE, RICHARD, THE SEVEN MYTHS OF GUN CONTROL (Random House: Prima 2001), WATERS, ROBERT A., GUNS SAVE LIVES (WA: Loompanics.com 2002).

[24] *See* Kopel, *What State Constitutions Teach About the Second Amendment,* 29 NO. KY. L. REV. 827 (2002), Volokh, *The Commonplace Second Amendment,* 73 N.Y.U. L. REV. 793 (1998).

OVERRULED, AND A FORM OF INCORPORATION INTO THE DUE PROCESS CLAUSE APPLIED, OR A *SAENZ* V. *ROE* (US 1999)[25] ANALYSIS UTILIZED.

An important issue splitting US Courts of Appeal is *how* the Second Amendment applies to the States. One approach is the due process clause of Amendment XIV. Another is the privileges and immunities clause. A third is to follow *Presser* v. *Illinois*[26] of the 1886 Court, a time of many discredited decisions, such as *Plessy* v *Ferguson*[27] and *Bradwell* v. *The State*.[28] On this point *Silveira* and *Emerson* agree, but there is abundant discord with other Circuits, the Fourth and Seventh. *See Love* v. *Pepersack*, 47 F.3d 120 (4th Cir.), *cert. denied*, 516 U.S. 813 (1995)(Second Amendment not applicable), *Quilici* v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir.)(2-1)(follows *Presser*), *cert. denied*, 464 U.S. 863 (1983).

Justice Brennan with characteristic understatement observed: "Many still believe that the dissenting opinion in the *Slaughterhouse Cases* expressed the sounder view." Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761, 767 (1961).

Silveira and *Emerson*, and other judges on the Ninth Circuit reject *Presser* v. *Illinois*, and *US* v. *Cruikshank*, both *supra*, as no longer authoritative. *Silveira* states:

"we are in agreement with the Fifth Circuit ... that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. *See Emerson*, 270 F.3d at 221 n.13." *Silveira*, 312 F.3d at 1067 n.17.[29]

Only "some" of the Ninth Circuit, however, rejects *Cruikshank* and *Presser*. Directly contrary to *Silveira* is

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25 526 U.S. 489, 503-04 (1999).
26 116 U.S. 252 (1886).
27 163 U.S. 537 (1896).
28 83 U.S. 130 (1873).
29 *Emerson*, a federal case, did not involve incorporation.

Fresno RPC v. *Van de Kamp*, 965 F.2d 723 (9th Cir. 1992)(Second Amendment does not apply).

Highest courts of more than one State have refused to apply the Second Amendment. New Hampshire now has its own broad "right [of persons] to keep and bear arms in defense of themselves, their families, their property and the state." N.H. CONST. Pt I, art 2-A (1982), and applies the article with strict scrutiny, as in *State* v. *Smith*, 571 A.2d 279 (N.H. 1990)(Johnson, J).[30] Other examples are: *Harris* v. *State*, 432 P.2d 929 (Nev. 1967), *Commonwealth* v. *Davis*, 343 N.E.2d 847 (Mass. 1976), *State* v. *Friel*, 508 A.2d 123 (Me. 1986).

To place the importance of these issues in context, consider if **nine** Circuits and four State high Courts decided *not* to apply the First and Fourth Amendments to the States. Would such cases be certworthy?[31]

A. INCORPORATION FOLLOWING *BENTON* AND *DUNCAN*

The usual and well-settled jurisprudence for applying an Amendment to the States is explained in *Benton* v. *Maryland*, 395 U.S. 704 (1969), following *Duncan* v. *Louisiana*, 391 U.S. 145 (1968):

"[T]he Fifth Amendment represents a fundamental ideal in our constitutional heritage.... [It] ... should apply to the

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30 Earlier, New Hampshire upheld a conviction for unlicensed mere possession of pistols in *State* v. *Sanne*, 364 A.2d 630 (N.H. 1976). The accused, however, had no appellate counsel in this firearms possession case to argue for incorporation. The State was well represented by a gentleman named Souter.

31 There was a lingering unargued right to keep minor arms issue here recently in *Bunkley* v. *Florida*, 123 S Ct ___ (2003)(per curiam). Bunkley carried a closed pocket knife with a ~2½ inch blade. This is no different from the innocuous Swiss Army knife carried by millions for numerous purposes, including use of its screwdriver and bottle opener. *See* www.swiss-knife.com. The "original" Swiss model has a 3¾ in. blade. Some have clippers, scissors, a compass, whistle, and spotlight, all useful for self defense and survival, as well as peeling oranges in Florida. Yet in Florida innocent possession can be the difference between five years versus **life** because that simple right of having minimal self protection has not been recognized.

States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko* v. *Connecticut* is overruled." 395 U.S. at 794.

The individual right to keep and bear arms – Second Amendment - also is "a fundamental ideal in our constitutional heritage." To the extent that *Presser* undercuts the Second Amendment, so too should *Presser* be finally overruled. *Presser* is even more vulnerable in reasoning than *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), overruled last Term.

B. INCORPORATION FOLLOWING *SAENZ* AND *DOE*

At least three generations of law students and constitutional lawyers have understood that the *Slaughterhouse Cases*, 83 U.S. 36 (1873)(5-4), and *United States* v. *Cruikshank*, 92 U.S. 542 (1876), were not well considered.[32] It is no coincidence that *Slaughterhouse* in the Reports sits next to *Bradwell* v. *The State*, 83 U.S. 130 (1873), another legacy of then judicial disregard for the Fourteenth Amendment and individual rights.[33] Dissenting Justice Noah Swayne

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[32] Modern persuasive scholarly analysis of the Fourteenth Amendment and privileges and immunities clause includes: MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (Duke 1986), MEYER, THE AMENDMENT THAT REFUSED TO DIE (Madison 2000), SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION (Greenwood Press 2000), Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993), Amar, *Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103 (2002), Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C.L. REV. 1071 (2000), Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). The recent book by Judge Sneed of the Ninth Circuit covers the material well. *See* SNEED, JOSEPH T. III, FOOTPRINTS ON THE ROCKS OF THE MOUNTAIN – AN ACCOUNT OF THE ENACTMENT OF THE FOURTEENTH AMENDMENT (1997).

[33] *Bradwell* allowed the State of Illinois to exclude women as a class from the practice of law, regardless of demonstrated skills, natural talent, and considerable education, as well as licensure in other States. The reasoning was minimalist. *Bradwell* follows *Slaughterhouse* in the pages of 83 U.S. Reports.

observed in *Slaughterhouse* that the majority turned "what was meant for bread into a stone." 83 U.S. at 129. One need not be a constitutional scholar to shudder at the reasoning and reality of *Slaughterhouse* and *Cruikshank*. They gutted the privileges or immunities clause, leaving next to no protection for the lives and liberty of freedmen, freedwomen, and those who supported their cause.[34]

Cruikshank did so following the murderous "Colfax massacre" in Louisiana of freedmen.[35] Federal prosecutors charged Klansmen with conspiracy to prevent blacks from exercising civil rights, including the rights to vote and to bear arms for defense of their community. *Cruikshank* freed the Klansmen to ride again, with no mention of the massacre.

Decades after *Cruikshank*, this Court used the due process clause of the Fourteenth to strengthen individual rights against oppressive state action, by incorporating most of the Bill of Rights into due process, one by one, and also recognizing home and family rights, as in *Troxel* v. *Granville*, 530 U.S. 57 (2000)(fundamental family rights).

Saenz v. *Roe*, 526 U.S. 489 (1999), is important here. *Saenz* recalled that "Justice Stewart reminded

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[34] MEYER, THE AMENDMENT THAT REFUSED TO DIE 64-67, 74-94 (Madison 2000), is a thorough short study of the history and errors of both the *Slaughterhouse* and *Cruikshank* cases.

[35] *Cruikshank* ignored the brutal facts of the Colfax Massacre, which today would be considered crimes against humanity. The HARPWEEK website contains this concise summary: "The second worst incident of violence was the Colfax Massacre of April 13, 1873. The fighting left ... 70 black men dead, with half ... killed after they surrendered. Federal officials arrested and indicted over 100 white men. They were later freed, however, when the U.S. Supreme Court ruled that the basis for their prosecution (part of the 1870 enforcement act) was unconstitutional." http://blackhistory.harpweek.com/7Illustrations/Reconstruction/GatheringTheDead.htm. *See generally* VANDAL, RETHINKING SOUTHERN VIOLENCE: HOMICIDES IN POST-CIVIL WAR LOUISIANA, 1866-1884 (Ohio State 2000), HOLLANDSWORTH, AN ABSOLUTE MASSACRE: NEW ORLEANS RACE RIOT OF JULY 30, 1866 (L.S.U. 2001).

us in *Shapiro* v. *Thompson*, 394 U.S. 618, 643 (1969), [that] the right [to travel] is so important that it is 'assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution ....'"(concurring opinion). In *Silveira* we have the *explicit* Second Amendment right, protected by both the due process and privileges & immunities clauses of the Fourteenth Amendment. All of the authorities from varying venues cited in footnotes 18, 26 & 37 agree, as well as Blackstone, and Cooley. Amar states:

"[T]he framers of the Fourteenth Amendment strongly believed in an individual's right to own and keep guns for self-protection. Blacks and Unionists down South could not always count on the local police to keep white night-riders at bay. When guns were outlawed, only Klansmen would have guns. Thus, the Reconstruction Congress made quite clear that a right to keep a gun at home for self-protection was indeed a constitutional right -- a true 'privilege' or 'immunity' of citizens."[36]

The *Cruikshank* Court restored the Klan and supporting lawless officialdom to power. This Court can undo that wrong.[37]

V. THE COURTS OF APPEAL & CITIZENS HAVE HAD *NO* DIRECT SECOND AMENDMENT GUIDANCE FROM THIS COURT SINCE THE SEVERELY CRITICIZED 1939 OPINION OF JUSTICE JAMES MCREYNOLDS IN *US V. MILLER*, WELL OVER 60 YEARS AGO, DESPITE THE PROLIFERATION OF FIREARMS LAWS & LITIGATION. *MILLER* SHOULD BE CAREFULLY RECONSIDERED BECAUSE IT: (A) BADLY MISREADS HISTORY, (B) THE *MILLER* COURT CASUALLY

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[36] Amar, *Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103, 110 (2002).

[37] The State action ignored in *Cruikshank* was the failure of the State to provide equal police protection to freedmen, as well as the active participation of local lawmen who were accomplices in the massacre and homicides. *See* VANDAL and HOLLANDSWORTH, *supra* note 40. The mass killings at Colfax were not unlike some recent scenes in Bosnia that have been prosecuted at the Hague.

DENIED COUNSEL TO MILLER IN A RUSH TO JUDGMENT WITHIN A MATTER OF ONLY A FEW WEEKS, DURING WHICH TIME THE MILLER SIDE HAD NO COUNSEL, BRIEF OR ARGUMENT, & (C) THE *MILLER* DECISION HAS CREATED INCONSISTENCY AND CONFUSION IN THE LOWER COURTS, APART FROM BEING A PLAIN MISCARRIAGE OF JUSTICE.

Recent scholarship on Justice James McReynolds and *United States* v. *Miller*[38] painfully exposes the inadequacies of the decision, as well as the Justice's unparalleled record of opinions systematically upholding every form of abridgment of fundamental rights. Those negative decisions ranged from racism in education[39], the judicial system[40], and voting,[41] to denial of First Amendment rights.[42] McReynolds even refused to sign the Memorial to Justice Brandeis or attend his funeral, so rigid was McReynolds' anti-Semitism. 306 U.S. at vi.[43]

That other Justices did not write in *Miller*, and concurred silently at the hurried end of the Term speaks nothing of the result if the case had been briefed and argued in a normal objective way. The other Justices had some **30** additional full opinions to

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[38] 307 U.S. 174 (1939). A thorough exposition of the *Miller* confusion is Denning, *Can the Simple Cite be Trusted?: Lower Court Interpretations of United States v. Miller and The Second Amendment*, 26 CUMBERLAND L. REV. 961 (1996)(analysis of misapplications of *Miller* in the US Courts of Appeal). *See also* Gardiner, *The Second Amendment and the U.S. Courts of Appeal*, 29 NO. KY. L. REV. 805 (2002).

[39] McReynolds, for example, dissented in the law school racial desegregation case of *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 353 (1938), although the State had no black law school at all.

[40] Justice McReynolds did not attend argument in the Scottsboro cases. See *Patterson* v. *Alabama*, 294 U.S. 600, 607 (1935).

[41] McReynolds would have sanctioned the voting discrimination against blacks found in *Lane* v. *Wilson*, 307 U.S. 268 (1939).

[42] He dissented against applying the First Amendment to the States in *Stromberg* v. *California*, 283 U.S. 359, 370 (1931).

[43] *See* THE FORGOTTEN MEMOIR OF JOHN KNOX (Univ of Chicago: Hutchinson & Garrow eds. 2002). Online material includes: www.michaelariens.com/ConLaw/justices/mcreynolds.html.

write in the few weeks before the Term ended on June 5, 1939. Moreover, in that era, dissent was strongly discouraged. Some 80% of decisions were unanimous. The rare dissent was usually noted, without an opinion. *See* MICHAEL E. PARRISH, THE HUGHES COURT: JUSTICES, RULINGS, & LEGACY, Table 1.2 at 25 (ABC-CLIO 2002). An example of a unanimous *Miller*-era decision by this Court that was later overturned would be *Commonwealth* v. *Gardner*, 15 N.E.2d 222 (Mass), *appeal dismissed*, 305 U.S. 559 (1938)(per curiam), overruled *de facto* in *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

This Court should grant certiorari to remedy the inadequacies of *United States* v. *Miller*, 307 U.S. 174 (1939), and to replace that flawed and ambiguous McReynolds opinion with well-reasoned principles to guide citizens and the lower courts. *Miller* misstates and misunderstands law and history repeatedly. The government argued in its unopposed *Miller* brief that:

"... [T]he carrying of weapons was always a crime under the common law of England and of this country."[44]

That claim, however, is untrue and contradictory. The authoritative writings of Blackstone, Rawle, Justice Story, Cooley, and English historical documents and treatises demonstrate overwhelmingly that the carrying of weapons was *not* generally a crime under the common law of England or of this country. Historian-lawyer David Hardy carefully details this background in his valuable book ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 12 & *passim* (Blacksmith, AZ 1986). Hardy notes:

"Yet more recent historians have traced the individual legal duty to own arms and be skilled in their use to 690 A.D., and concluded that it is in fact 'older than

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[44] Brief of the United States, *United States* v. *Miller*, at 4 (US, October Term 1938, No. 696).

our oldest records.' J BAGLEY & P ROWLEY, I A DOCUMENTARY HISTORY OF ENGLAND 152." [45]

Typically in those ancient years the possession of arms was never a crime, unless there was a factor of monarchial, parliamentary, or religious persecution-discrimination. Our Founders generally frowned upon such a legal rationale, and many British traditions. Also, there might be an offense if the carrier of arms were menacing the populace, rather than carrying for self or other defense. Hardy, *supra,* and Joyce Lee Malcolm develop this historical material well.[46] The government and Justice McReynolds did not.

Madison pointed out in THE FEDERALIST NO. 46 that Americans possess "the advantage of being armed ... [unlike] the people of almost every other nation ...." Moreover, other "governments are afraid to trust the people with arms."[47] The British were different. Parliament and Monarchs ruled. It is incongruous to rely upon English statutory law spawned by a haphazard hereditary monarchy, when that very law sought to suppress the American Revolution by disarming and shooting at our nation's Founders.

Blackstone stated in his 1803 COMMENTARIES:[48]

"5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence ...."

"[It] is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."

"... the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birth-right to enjoy entire ...."

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45 DAVID HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 12 (Blacksmith, AZ 1986).

46 *See* MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE (Harv. 2002).

47 THE FEDERALIST No. 46, at 335 (N.Y.: Wright ed. 1961).

48 II Blackstone, The Rights of Persons, in COMMENTARIES bk. 1, c. I, 127, 143, 144 (1803).

The *Miller* opinion cites BLACKSTONE,[49] but the wrong chapter, and for an irrelevant proposition. The most often quoted errant paragraph from *Miller* states:

"In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette* v. *Tennessee*, 2 Humphr 154, 158 (Tenn. 1840)." 307 U.S. at 178.

If such evidence were constitutionally significant to a Second Amendment analysis, the Court could have remanded for further findings, or researched the topic of shotguns used in military and defensive engagements. More than enough historical material exists for an impressive book, namely SWEARENGEN, IV THE WORLD'S FIGHTING SHOTGUNS (Alex. Va.: Ironside Publ. 1978)(available in DC at Borders). The Court would have found that short-barreled shotguns were legitimately useful from pre-Revolutionary times to date, as can be developed with judicial notice materials in the briefs to follow.[50] Mr. Miller's shotgun would be quite effective in defending a household from invasion by multiple combatants, gangs, or terrorists at close range. Justice McReynolds made erroneous bare assumptions without evidence, knowledge, or judicial notice materials. The Justice invented the militia-useful suggestion, without any historical or textual authority, or study of weaponry, military or otherwise. Moreover, the indictment did not charge

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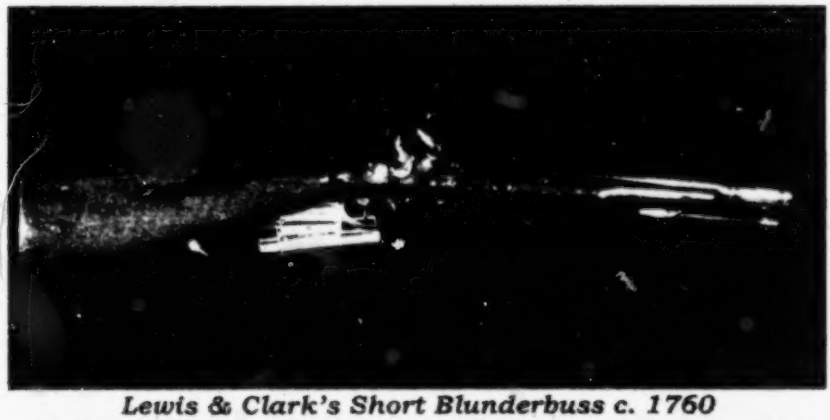
[49] Justice McReynolds cites BLACKSTONE'S COMMENTARIES, Vol. 2, Ch. 13, p. 409 on King Alfred. *Miller*, 307 U.S. at 179.

[50] An excellent article on short shotguns in American history, and the material missed completely by Justice McReynolds is Puckett, *United States* v. *Miller* and Short-Barreled Shotguns (2003)(essay – publication pending).

Miller with having a firearm unrelated to potential personal or common defense, much less a militia connection.

Justice McReynolds does observe that "ordinarily when called for service these [Militia] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[51] Bostonians had blunderbusses for defense against the British, who tried to confiscate them! *See* RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (N.Y.: DaCapo Press 1970 ed.) Lewis & Clark armed themselves with blunderbusses, the 1803 version of a short-barreled shotgun, for protection from Natives and Bears.



Lewis & Clark's Short Blunderbuss c. 1760
National Museum of American History, Washington, D.C.
www.loc.gov/exhibits/lewisandclark/images/lcp0041s.jpg

Justice McReynolds cites in a final footnote three "important opinions and comments by writers."[52] McReynolds mistakenly cited the Story discussion of a militia, not of "the right of the citizens to keep and bear arms." McReynolds also cited the wrong Cooley treatise. Cooley's pertinent work, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW sec. IV (1898), explains:

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51 *Miller*, 307 U.S. at 179.

52 His specific cite is: "Cooley's Constitutional Limitations, Vol 1, p 729; Story on The Constitution, 5th Ed, Vol 2, p. 646." 307 U.S. at 182 n.3. The *Miller* opinion has only three footnotes.

"*The Right is General.* -- It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. ... The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose."

The historical and legal authorities he cited - Story and Cooley - both flatly contradict his holding and military connection. The absence of quality in the reasoning and historical analysis of *Miller* is another reason why the case should be revisited and overruled. *Compare Lawrence* v. *Texas,* 539 U.S. ___ (2003)(Slip op. 7-17)(critique of *Bowers* decision).

UNWARRANTED DENIAL OF COUNSEL & ARGUMENT TO *MILLER*, AND RUSH TO JUDGMENT

The report of *Miller*, 307 U.S. 174, 175 (1939), recites only Gordon Deans' appearance, seven other government lawyers on the brief, and no representation at all for Miller. This was a denial of appellate counsel and argument. The hurried events are documented in the National Archives case file. The Court nonetheless noted probable jurisdiction (and heard oral argument 17 days later!).

The Clerk on March 15, 1939, wrote to Miller's previous Arkansas trial counsel, Paul Gutensohn, stating that he should appear March **31** for oral argument.[53] That allowed hardly two weeks for the drafting and printing of a full brief, preparation for oral argument, and travel. Counselor Gutensohn replied March 22 that he had not even received the

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53 Letter, Charles Elmore Cropley, Clerk, to Paul E. Gutensohn, Esq, Mar. 15, 1939, NATIONAL ARCHIVES, SUPREME COURT CASE RECORDS, *United States* v. *Miller,* October Term 1938, No. 696. The Court actually heard argument March 30. If Gutensohn had appeared March 31 as directed, he would have been a day late.

brief of the government, nor the record.[54] He had only been court-appointed trial counsel. Clerk Cropley responded March 25, five days before the scheduled argument, that Gutensohn should file a brief early the next week.[55] Gutensohn replied March 28 with a Western Union telegram stating: "SUGGEST CASE BE SUBMITTED ON APPELLANTS BRIEF. UNABLE TO OBTAIN ANY MONEY FROM CLIENTS TO BE PRESENT AND ARGUE CASE = PAUL E GUTENSOHN."[56] This was against the interests of his clients. Jack Miller, accordingly, did not have a brief or any representation at the oral argument on March 30, 1939. The Chief Justice did not pass the case and inquire about the absence of counsel, or appoint other counsel to undertake representation for reargument.

The railroad rush, the absence of briefing, and the failure to appoint counsel, all diminish *Miller* as a credible precedent. The case was a classic miscarriage of justice, unthinkable today. It was no *Gideon.*

The defining issue here is whether an indigent appellee, in a government appeal to the Supreme Court, is entitled to appointed counsel. *Hardy* v. *United States,* 375 U.S. 277 (1964), for example, squarely held that an indigent defendant convicted in the District of Columbia had a federal constitutional right to a complete transcript on appeal to the US Court of Appeals. The Court appointed counsel when the trial lawyer withdrew.

Recent decisions on ineffective counsel also support this analysis of *Miller* as a defective decision, such as *Roe* v. *Flores-Ortega,*[57] and *Penson* v. *Ohio.*[58]

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54 Letter, Paul E Gutensohn, Esq, to Charles Elmore Cropley, Clerk, Mar. 22, 1939, Id.

55 Letter, Charles Elmore Cropley, Clerk, to Paul E. Gutensohn, Esq, Mar. 25, 1939, Id.

56 Telegram, Paul E. Gutensohn, Esq, to Charles Elmore Cropley, Clerk, Mar. 28, 1939, Id.

57 528 U.S. 470, 481-483 (2000)(failure to file notice of appeal held ineffective).

The *Miller* case was an instance of "the forfeiture of a proceeding itself." *Roe*, 528 U.S. at 483. This Court surely must not allow *Miller* to remain as authority for any point of law, much less the sole [**mal**]interpretation of a key right in the Bill of Rights, the Second Amendment.

VI. THE COURTS OF APPEAL ARE IN DISARRAY ON WHETHER TO APPLY A HEIGHTENED STANDARD OF REVIEW IN SECOND AMENDMENT CASES. EXPRESS FUNDAMENTAL RIGHTS ARE DIRECTLY INVOLVED AND SHOULD RARELY BE LIMITED, AND THEN ONLY FOR THE MOST COMPELLING OF JUSTIFICATIONS.

Petitioners suggest a heightened standard of review in all Second Amendment cases, as with the First Amendment, because express fundamental rights are at risk. Beyond that is the further right to protect and defend home and family, recognized in the cases leading up to *Troxel* v. *Granville*, 530 U.S. 57 (2000). The heightened scrutiny applied in *Troxel* is appropriate.[59] Protecting family and children are core purposes of the Second Amendment. Violent home invasions take place on a serious scale, as do assaults upon citizens in their workplaces. Indeed, because of the risk of violence, both defendants have taxpayer-paid armed bodyguards, as do many other California officials.[60] The rounding up of guns from private homes, facilitated by gun registration, leaves families defenseless against burglary, gangs, violent civil disorder, and terror, unless they have exceptional

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[58] 488 U.S. 75, 88-89 (1988)(claim that counsel did not represent defendant on appeal).

[59] While *Lawrence* v. *Texas*, *supra*, did not discuss standard of review at length, the Court relied upon a number of strict scrutiny decisions such as *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). Those apply with greater strength here because the Second Amendment is an express fundamental right.

[60] The Associated Press in August 2000 reported: "Among all the states, only California provides bodyguards to all its statewide officials .... More than $31 million this year .... California Attorney General Bill Lockyer is protected by special agents ...."

wealth or hold high office. Civil disorders such as those in D.C. and L.A. from time to time especially show the need for business owners to have deterrent defensive weapons to prevent looting and arson.

Historically, gun registration has led to confiscation and attendant horrors. Judge Kozinski notes this in his dissenting opinion below. 327 F.3d at 568-70. (**App.** at 4A-6A). The well-researched book, GUN CONTROL: GATEWAY TO TYRANNY – THE NAZI WEAPON LAW 18 MARCH 1938, J. Simkin & A. Zelman (1992), also documents how the SS inherited lists of firearm owners and their arms in March 1933. The SS used these lists to seize privately held firearms from persons who were not considered to be "reliable." *See* www.jpfo.org/GCA_68.html.

Private firearms in the hands of 6 million European Jews would have altered the course of history for many of our ancestors who did not survive.

As the concurring opinion of Justice Thomas in *Troxel* reminds, "strict scrutiny [applies] to infringements of fundamental rights." 530 U.S. at 80. A heightened standard of review would clarify Second Amendment jurisprudence immensely and align it with First Amendment practice that is closely analogous.

VII. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE US COURT OF APPEALS IN *SILVEIRA V. LOCKYER*, 312 F.3d 1052 (9th Cir 2003), AND REMAND FOR FURTHER PROCEEDINGS, INCLUDING AN ASSESSMENT OF REASONABLE INTERIM COUNSEL FEES UNDER 42 U.S.C. §1988 PRIOR TO TRIAL OF THE REMAINING FACTUAL QUESTIONS.

If Petitioners prevail in this Court sufficiently on the issues set out above, they will have assisted the Court in sorting out the law of the Second and Fourteenth Amendments from the past 64 years. As substantially prevailing parties, Petitioners should receive costs, reasonable counsel fees, and

appropriate litigation expenses under §1988.

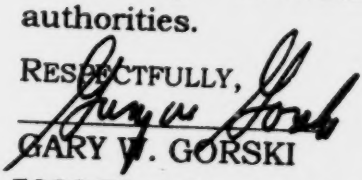
This would fit the requirement from *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 (1980)(per curiam), that: "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." Prevailing on the principal questions presented by this Petition would be a far greater victory than an award of nominal damages, sufficient in *Farrar* v. *Hobby*, 506 U.S. 103 (1992). *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), applies. This Court should order that the fees be assessed before other proceedings below on remand.

CONCLUSIONS

For the reasons set out, this Court should grant the petition for writ of certiorari, reverse the judgment of the US Court of Appeals in *Silveira* v. *Lockyer*, 312 F.3d 1052 (9th Cir. 2003), and remand.

This would be the first Second Amendment appeal to be heard since 1939. The case presents several complex and important constitutional questions. Petitioners suggest that the Court allow two and one-half hours for oral argument and 75 pages for briefs, with permission to file appendices (8.5 x 11) containing essential historical documents and authorities.

RESPECTFULLY,



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